In my opinion therefore the inferences to be drawn from these two facts are sufficient to satisfy the Court that the agreement formed part of a transaction which was in essence a mortgage of the land in question to secure the repayment of $2,000.

For the defence it was submitted that in any case the agreement of 30th January, 1945, was void as the plaintiff had not re-purchased the land within the stipulated period of three years. But in *Haji Abdul Rahman v. Mohamed Hassan*[2] the Privy Council laid down that where an agreement is in the nature of a mortgage the right to redeem remains irrespective of whether or not the period within which it is specified the loan shall be repaid has expired. The stipulation that the land shall be re-purchased within three years does not therefore affect the plaintiff's right to redeem.

I think the agreement of 30th January, 1945, should be construed as a mortgage and that this appeal should be allowed with costs and an order made for the transfer of the land to the plaintiff upon his paying the defendant a sum equal to $2,000 Japanese currency revalued under the Debtor and Creditor (Occupation Period) Ordinance, 1948, as at 28th October, 1944.

Briggs, J. : — I have had the advantage of reading the judgment of Mr. Justice Jobling. I entirely agree with it, but, as we are differing from the learned trial Judge, I express my own views shortly.

The essential point of this case was whether the agreement of the 30th January, 1945, was so linked with the transfer of the 28th October, 1944, that one should infer that it represented a record, subsequently made, of an oral agreement, contemporaneous with the transfer, that the transfer was to be merely by way of security. The learned trial Judge found no such link; but I think it existed in the retention of possession of the land by the vendor upon the transfer. If this was not to be taken as indicating that the transfer was made by way of security only, it was for the defendant to offer evidence explaining it on some other grounds, which he failed to do. In the absence of such evidence I am satisfied that the transaction was the familiar one of *jual janji*. The wording of the agreement and the amount of the consideration for re-transfer (in a rapidly depreciating currency) tend to support this view. Once that is established, it matters not whether the agreement was in form an agreement of purchase and sale or an option. The case of *Haji Abdul Rahman v. Mohamed Hassan*[2] shows that in either event time is not of the essence of the contract, since the later transaction will be in effect a redemption. I am inclined, however, to think that on a true construction the agreement was one of sale. The words "Mark of person who agrees to re-purchase" should, I think, be given their full effect.

I agree that this appeal should be allowed, and concur in the order proposed by Mr. Justice Jobling.

Appeal allowed.

LIM EOW THOON & ANOR. v. TAN PENG NEOH (m.w.).

[Court of Appeal (Pretheroe, Ag. C.J., Russell and Briggs, JJ.) August 31, 1950]
[F.M. — Civil Appeal No. 19 of 1950]

Will — Creation of trust — Termination of trust.

By her will, Lee Chu Nio (deceased) created a trust in the following terms:— "I give and devise unto my trustees my house known as the Grange Tanjong Bungah together with the compound consisting of four acres to hold the same as a family residence for so long as the law allows that is to say for twenty-one years after the death of the last of my children or grandchildren living at my death who shall survive me for the use of my children and their descendants including adopted children ....." The testatrix died on the 18th May, 1924. In the year 1930 an originating summons was brought into Court and Sproule, J. made an order on the 12th December, 1930, approving "the terms of settlement of all questions arising in this suit" which were set out in a long schedule attached to the order. Among the properties so distributed was the Grange. The matter came before the Court again in April 1950 and Jobling, J. decided that the Grange was no longer subject to the trust created by the will of the testatrix. No mention was made of the trust in the order of Court and some of the cestuis que trust were not represented.

Held, that as there was no express provision in the order of the 12th December, 1930, to terminate the trust and as no provision was made for the interests of unborn beneficiaries, the trust was not extinguished by the order.

Cases referred to :—

(1) *Re Whiting* (1905) 1 Ch. 101.
(2) *Cardigan v. Curzon Howe* (1901) 2 Ch. 479.
(3) *Fussell v. Dowding* 27 Ch. D. 237 at page 240.

CIVIL APPEAL.

F. G. Pooley for the appellants (1st and 2nd defendants).

Ong Huck Lim (*Khoo Eng Cheang* with him) for the respondent (plaintiff).

T. E. Conaghan for Theang Heang Neoh and Wee Poh Neoh and also the estate of Wee Gim Neoh, deceased.

Khoo Soon Chee for Acting Senior Assistant Registrar, Supreme Court, Penang.

Cur. Adv. Vult.

Pretheroe, Ag. C.J. : — I have had the advantage of reading the judgment prepared by Briggs, J. I am in agreement with his decision, but I will briefly set out the reasons for my opinion, as we are differing from the learned trial Judge. The facts are fully set

out in the judgment of Briggs, J. and need not be repeated here.

By her will, Lee Chu Nio (deceased) created a trust in the following terms:—

"I give and devise unto my trustees my house known as the Grange Tanjong Bungah together with the compound consisting of four acres to hold the same as a family residence for so long as the law allows that is to say for twenty-one years after the death of the last of my children or grandchildren living at my death who shall survive me for the use of my children and their descendants including adopted children....."

The testatrix died on the 18th May, 1924. Apparently there was some dispute regarding the distribution of the property because in the year 1930 the matter was brought before the Court by way of an originating summons. Unfortunately, the Court file was lost during the period of the Japanese occupation and all that is known definitely is the order made in that summons, as a copy was filed with the Registrar of Deeds and still survives. In that order, dated the 12th December, 1930, Sproule, J. approved "the terms of settlement of all questions arising in this suit" which were set out in a long schedule attached to the order. Among the properties so distributed was the Grange. The matter came before the Court again in April, 1950, and Jobling, J. decided that the Grange is no longer subject to the trust created by the will of Lee Chu Nio (deceased). As the Court file is missing, no certainty in the matter is possible, but when the appeal was argued it was common ground that if the trust had in fact terminated it could only have been by the order of Sproule, J. made on the 12th December, 1930. It is true that that order allotted the Grange to one of the parties and made no mention of the trust. It is of no advantage to speculate what happened when the matter was before Sproule, J. It is, however, certain that the *cestuis que trustent* were not represented on that occasion. There is no express provision in the order to terminate the trust and, in my view, there is no provision terminating the trust by necessary implication. Finally, the order made no provision for unborn children who would become beneficiaries under the trust. We were informed that there are now six such beneficiaries. For these reasons I am of opinion that the trust survived the order mentioned. This being the case it is common ground that it still subsists.

There was no appeal from the order to sell the Grange and pay the money into Court. That order therefore remains effective and I agree with Briggs, J. that, as the house is not now inhabitable, sale of the property will probably be for the common good of the interested parties.

At the start of the appeal the question was raised as to whether counsel for Theang Heang Neoh, Wee Poh Neoh and the Senior Assistant Registrar could be heard as they had not been made respondents. We decided to hear counsel for these interested persons as *amici curiae* and to decide the point at a later stage. Later both counsel made formal application to be joined as respondents. I agree that that is the correct procedure and the Court orders that they be so joined and the title of the Originating Summons amended accordingly.

In my opinion this appeal should be allowed. A new paragraph should be substituted for the fourth paragraph of the declarations in the order of the 8th May, 1950, stating that the trust created by the will of Lee Chu Nio (deceased) still subsists and that the trust affects the rights of Tan Peng Neoh and also these persons in whom the equity of redemption is vested. Liberty is granted to restore Originating Summons No. 35 of 1949 to the list and also liberty to all parties to apply generally therein. Costs are awarded as set out in the judgment of Briggs, J., and the deposit of $500 will be paid out to appellants' solicitors.

Russell, J.: — I have had the advantage of reading the judgment of Mr. Justice Briggs. I agree with it and have nothing to add.

Briggs, J.: — By her will dated 8th July, 1923, Lee Chu Neo appointed Wee Theang Hock, Wee Theang Siew and Theang Heang Neoh her executors and trustees. She devised her house (hereinafter called "the Grange") at Tanjong Bungah to her trustees "to hold as a family residence for so long as the law allows" for the use of her descendants and others, with remainder to Wee Theang Hock and Wee Theang Siew. She devised the residue of her property on trust for sale and to divide between named beneficiaries. Other provisions are not now relevant. Lee Chu Neo died on 18th May, 1924. Her estate was large, but consisted mainly of land and was heavily encumbered. The trustees named proved the will.

In Penang Originating Summons No. 87 of 1930, wherein Wee Theang Hock was plaintiff and Wee Theang Siew, Theang Heang Neoh, Tan Peng Neoh, Wee Gim Neoh, Wee Poh Neoh and Wee Siew Neoh were defendants, Mr. Justice Sproule made an order on the 12th December, 1930, approving "the terms of settlement of all questions arising" in that suit and giving leave to carry the settlement into effect. The terms were contained in a long schedule, which gives the impression that the estate had been fully

administered, save as to the trusts of the Grange and the distribution of residue, and that it was now intended to distribute the residue. The parties to the originating summons were, in the events which had happened, the persons entitled to that residue. The schedule provided for distribution of specific properties to the plaintiff and other specific properties to the defendants, other than Tan Peng Neoh. These last included the Grange, which is said to have been the only one then unencumbered. There was also provision that the remaining defendant, Tan Peng Neoh, who was then an infant, should receive $37,000 from "the defendants", that this sum should be paid into Court to her credit and that pending such payment the title deeds of the Grange should be "deposited" as security — it was not stated where. Counsel had been duly appointed to report on the proposed settlement from Tan Peng Neoh's point of view. The parties then gave one another mutual releases as regards any other claims to the estate of Lee Chu Neo. Since that time the file of the proceedings has been lost, and no record of them remains except the Order of Court itself which was on record in the Registry of Deeds.

The settlement was not carried out for some time, but in 1934 the Grange and other properties were conveyed by the trustees to the defendants other than Tan Peng Neoh as arranged, save that Wee Siew Neoh had died and her share went to Tan Theam Swee, her personal representative. The respective shares conveyed were 5/9ths to Wee Theang Siew and 1/9th to each of the others. On the same day the transferors, other than Tan Theam Swee, mortgaged the Grange to Tan Peng Neoh for $37,000, with no personal covenants for payment and no provision for interest. Immediately prior to the mortgage Tan Theam Siew had apparently executed a deed of assent in favour of Wee Theang Siew and Wee Gim Neoh, so that the mortgage was effective to convey the whole property. No payment was made into Court, and the title deeds of the Grange were not deposited.

In Penang Originating Summons No. 95 of 1949, as amended, Tan Peng Neoh, now of age, as plaintiff applied that the defendants Lim Eow Thoon and Lim Eang Tee as personal representatives of the estate of Wee Theang Siew, now deceased, Theang Heang Neoh and Wee Poh Neoh be ordered to pay into Court the sum of $37,000 in pursuance of the order dated 12th December, 1930, and also interest thereon since 1930. Wee Poh Neoh was appointed by Order of Court of the 25th May, 1949, to represent the estate of Wee Gim Neoh, now deceased, in the proceedings and to be added as a party as such representative. The Senior Assistant Registrar, Penang, was appointed by order of Court of the 3rd April, 1950, to represent the class of persons entitled to use the Grange as a family house. This representation order did not, as I think it should have done, exclude those persons so entitled who were already parties to the proceedings, but the class includes several infants who were not parties and who are directly interested in the gift of the Grange, but not otherwise interested under Lee Chu Neo's will.

It is common ground that none of the respondents to Originating Summons No. 35 of 1949 was in any position to pay into Court the money claimed, and in consequence it was sought to satisfy Tan Peng Neoh by selling the Grange and paying her out of the proceeds. Tan Peng Neoh did not object to this, and on 15th August, 1949, (before the second representation order mentioned above was made) an order was made for sale of the Grange and payment of the proceeds into Court to the credit of Originating Summons No. 35 of 1949. On the summons to proceed under this order for sale Lim Eow Thoon filed an affidavit sworn the 7th December, 1949, in which he brought to the Court's notice the provisions of Lee Chu Neo's will regarding the Grange, and the existence of beneficiaries who had not been parties to any of the proceedings referred to above.

Conveyancing counsel was instructed to report on the title of the Grange, and objections to his report were carried in by Theam Heang Neoh and Wee Poh Neoh, of which the material one for the purposes of this appeal is as follows :—

> "4. That he is wrong in stating that the said lands are subject to the Trusts of the Will of the Testatrix as to the said lands being available for the use of the children of the Testatrix and their descendants."

These objections were considered by Mr. Justice Jobling on further consideration of Originating Summons No. 35 of 1949 on 5th April, 1950. It will be noted that the second representation order had been made only two days previously, and counsel was briefed for the the Senior Assistant Registrar only on the afternoon of the 4th. He had therefore to deal with this difficult matter after very short preparation, and deserves sympathy if his conduct of it before Jobling, J. left something to be desired.

On the hearing there was some discussion of the claim to interest. Later it was agreed that $15,000 should be paid for interest up to the 8th May, 1950, making Tan Peng Neoh's total claim $52,000.

As regards the title to the Grange, the Court held that the conveyance of 5th October, 1934, was effective to vest the title in the transferors and that the mortgage

vested title in Tan Peng Neoh subject to the proviso for redemption. Against this part of the order notice of appeal was given, but on the hearing counsel quite rightly did not take the point. I am satisfied that in this respect the order was right. The Court also held that the Grange was no longer subject to the trusts created in respect thereof by Lee Chu Neo's will, and ordered in consequence of this that upon completion of the sale the proceeds, after payment of costs, should be paid to the extent of $52,000 to Tan Peng Neoh. This consequential order is expressed to have been made by consent and notice of appeal was not given against it. The appeal is therefore in form only against the decision that the trusts no longer affect the Grange. I think it must have been overlooked that if that decision, which was strenuously contested, were wrong, the order for payment to Tan Peng Neoh must also be wrong, and, if application had been made, I think this Court might have held that the words "by consent" were inserted by mistake and that appeal would lie. In any event, as an appeal against part of the order is before us, we can, I think, adjust if necessary any part of the order which may appear in consequence of that appeal to be wrong, even though such part is not mentioned in the notice of appeal, and was by reason of a consent unappealable.

It will be observed that the present infant beneficiaries were not parties to the order for sale, and an application to set it aside could no doubt be made; but I think it unlikely that this will occur. It seems that the house standing on the property is dilapidated and that the only real value of the property is as building sites. That value is substantial and an offer of $60,000 is said to have been made. Again, the relations between the members of this family are apparently not such that a family house would be likely to serve the purpose for which it is intended. It may well be for the benefit of all that the Grange should be sold as ordered, subject to all questions as to disposal of the proceeds of sale. With this, however, we are not at present concerned. In substance the only question before us is whether the Grange is still affected in the hands of the present owners by the trusts created in respect thereof by the will of Lee Chu Neo.

Mr. Justice Jobling gave his decision on 8th May, 1950, and the appeal against it was brought by Lim Eow Thoon and Eang Tee as personal representatives of Wee Theang Siew. All parties concerned were served with the notice, but only Tan Peng Neoh was named as respondent. At the hearing of the appeal Theang Heang Neoh, Wee Poh Neoh, both personally and in her capacity as representing the estate of Wee Gim Neoh, and the Senior Assistant Registrar were heard by counsel on the question whether they were, or should be, parties to the appeal. This question was deferred and in the meantime their counsel were heard on the substance of the appeal as *amici curiae*. At a later stage the appellants' counsel applied formally that they should be joined as respondents and that the proceedings should be amended accordingly. Without holding that they were technically necessary parties, I am of opinion that they should be so joined, and would order joinder and the necessary amendments. One might have expected that the appeal would be brought in the first place by the Senior Assistant Registrar, who was most directly interested in its success; but his counsel in the Court below was evidently of opinion that his client had no case, though he changed his view before us and supported the appeal.

It was agreed before us by all parties that, if the trusts affecting the Grange have been extinguished, that can only have been done by the order of 12th December, 1930. It is apparent that all parties concerned were at all times fixed with notice of those trusts and that, if the trusts are subsisting, they bind the present owner and others interested in the legal estate or the equity of redemption. All those parties are now before the Court.

It was suggested that, since the appellants' predecessor in title was a party to the 1930 order, they cannot be heard to contest it. The short answer is that they are not doing so; they are merely asking that it should be explained.

Any consideration of this matter must start with an enquiry as to how the order of 12th December, 1930, came to be made at all, and in the absence of the record it is not easy to understand this. It is possible that the portion of the will creating the trusts of the Grange was never before the learned Judge at all. The matter may have been dealt with on affidavits containing a copy of an extract from the will, but not a copy of that part of it. The passage may have been overlooked and not brought to the Judge's notice. It may not have occurred to anyone that, though all living beneficiaries were represented, unborn infants might be affected. I am willing to make any of these assumptions.

I am not willing to assume, as we were invited to do by counsel for some of the respondents, that the Court appreciated that the interests of unborn infants were involved, considered those interests to be adequately represented by the trustees, and deliberately

extinguished those interests without compensation or alternative benefit. All those assumptions must be made if the order of Jobling, J. is to stand.

It is true that in many cases the interests of unborn children can properly be represented by the trustees. It has been held that, where no member of a class is in being, a representative of that class cannot be appointed under provisions of law such as were in 1930 contained in section 142 of the Civil Procedure Code, 1907, and are now contained in Rules of the Supreme Court, 1934, Order 16 rule 29. See *Re Whiting*[1]. The inconvenience of this rule has been recognised in England, where Order 16 rule 32 in its present form has reversed it. It is, however, clear that the question whether trustees did in a particular case represent unborn infants will be examined by the Court, and that the first point for enquiry is, "Did the trustees do their duty as such representatives?" See *Re Whiting* (at page 113), *Cardigan v. Curzon Howe*[2] *and Fussell v. Dowding*[3].

In Originating Summons No. 87 of 1930 the trustees obviously did not do their duty to the unborn infants. One of them applied to the Court to make an order, the necessary effect of which, if Jobling, J. was right, was to expunge their interests, and the other two as respondents apparently did not oppose, and benefited by, that order. The trustees did not appoint separate counsel to represent the interests of the unborn infants, and it seems in the highest degree improbable that those interests were ever mentioned to the Court. Counsel who certified as regards Tan Peng Neoh was not concerned with unborn infants. The mutual releases alone would be conclusive against any representation by the trustees. It is even doubtful if the trustees *as such* were parties to the proceedings.

Counsel were asked at the hearing of this appeal if they could suggest any conceivable benefit which the unborn infants received in consideration of the suggested extinguishment of their interests. They were only able to suggest that there might be a benefit to them in the general cessation of litigation. As they could not possibly have been required to pay the costs of any such litigation, and could only have been adversely affected by it by some diminution of the respective interests which they lost entirely, this suggestion falls to the ground. It was never seriously pressed, and it is obvious that the order could not in fact benefit the unborn infants in any way. It seems equally obvious that Sproule, J. could never have supposed that it did, and since, without being satisfied on that point, he could not have made an order extinguishing the trusts for the unborn infants, the inference is either that the order was not intended to extinguish such trusts, or that Sproule, J. was not aware of their existence. I entirely decline to accept any suggestion that Sproule, J. may have extinguished the interests in question unconsciously and, as it were, by accident. If he was unaware of the existence of the trusts, he was misled into making the order, and in proceedings appropriate for that purpose it could be set aside. I believe that in fact Sproule, J. was wholly unaware of the existence of the trusts in question. We are not, however, now being asked to set aside the order of the 12th December, but only to say what was its effect.

I am willing, so far as possible, to give effect to the presumption allowed by section 114 of the Evidence Ordinance, 1950, to the effect that judicial acts have been regularly performed. I do so by presuming that, if there had been any intention to extinguish these trusts, a grave irregularity would have occurred, since in the circumstances the trustees did not, and could not properly, represent the unborn infants, and in the absence of such representation the order could not be made, or at least would not bind them and would therefore be ineffective. I conclude from this line of argument that there was never any intention to extinguish the trusts.

I find nothing whatever in the wording of the order to shake this opinion. I see ample indications that Sproule, J. did not have regard to their existence, but none that he intended to affect or alter them. I think that, if he had been aware of the existence of the trusts and had really considered them, he would certainly not have made the order as he did. There was no reason why the Grange should, on that basis, be removed from the hands of the old trustees to the hands of new ones, and no reason for ordering a "deposit" of the title deeds in such a way as to suggest that they were to be security for the payment of money to Tan Peng Neoh. These provisions, so far from extinguishing the trusts, show, to my mind, that they were completely overlooked. I see no reason to suppose that there was deliberate concealment, but, at least as regards the trustees, even the oversight was blameworthy, and may have its consequences when the question of costs is considered.

The mere fact that there is no reference to the trusts of the Grange in the order of Sproule, J. or the schedule would to my mind be almost conclusive that it was not intended to affect them. The extinguishment of any trust by the Court under statutory powers is a serious matter and calls for clear and precise expression.

If one is asked to say that a trust is extinguished by implication, nothing less than necessary implication will suffice, and that implication is in no way necessary here.

Counsel for the appellants drew our attention to a number of minor defects and errors in the 1930 proceedings. None of them is individually of great importance, but together they do tend to indicate that the matter did not receive scrupulously careful attention. The order of 12th December, 1930, was clearly a settlement of private differences between a number of individuals. There is nothing to indicate that it was anything more.

To summarize, there was no reason in 1930 why the trusts of the Grange should be extinguished, but good reason why they should not. Since no benefit could accrue to the unborn infants, their extinguishment would have been contrary to law. Even if otherwise lawful, it would still have been unlawful if the unborn infants were not properly represented; they were not, in the circumstances, so represented by the trustees, or by anybody else. If the order had the effect attributed to it by Jobling, J., almost everything possible was wrong with it. If the trusts of the Grange were overlooked, they cannot have been extinguished, since such extinguishment can only be effected by a considered and deliberate act of the Court. It seems almost certain that they were overlooked, as otherwise there would have been grave objections to the order made. There is nothing, however, in the order which is necessarily repugnant to the continued existence of the trusts, and, in the absence of anything necessarily repugnant, I refuse to accept that the trusts were extinguished by implication.

I would allow this appeal and substitute for the fourth paragraph of the declarations in the order of the 8th May, 1950, a declaration that the Grange is still subject to the trusts created by the will of Lee Chu Neoh deceased and that those trusts affect both Tan Peng Neoh and the persons entitled to the equity of redemption. I would substitute for the provisions for disposal of the proceeds of any sale of the Grange contained in the same order an order that such proceeds be paid into Court to abide further order of the Court. If such a sale takes place, it will presumably be necessary for those interested in the legal estate and the equity of redemption of the Grange to formulate a scheme for the distribution of the proceeds of sale in such manner as will carry out *cy-près* the wishes of the testatrix; but that does not arise now. It may be necessary that an order should be made for payment by certain persons of $52,000 or some other sum to Tan Peng Neoh; that also does not arise now. There will be liberty to restore Originating Summons No. 35 of 1949 to the list for further consideration, and, as a precautionary measure, I think there should be liberty to all parties to apply generally therein.

The costs of this appeal of the Senior Assistant Registrar, as between solicitor and client, must be paid in priority to all other claims out of any proceeds of sale of the Grange or raised by mortgage or charge thereon. The party and party costs of the appellants of this appeal must be paid by the respondent Tan Peng Neoh. They will have recourse for their solicitor and client costs to the estate of Wee Theang Siew. The remaining parties to the appeal will bear their own costs thereof, and Wee Poh Neoh will have recourse to the estate of Wee Gim Neoh for any amount by which her costs have been increased by representing that estate. The deposit of $500 will be paid out to the appellants' solicitors.

The order of Jobling, J. as to the costs of the proceedings in the Court below will be set aside and there will be an order that such costs be reserved to the Judge on further consideration of Originating Summons No. 35 of 1949. He will no doubt have regard to the breaches of duty on the part of the trustees in 1930 which ultimately gave rise to these proceedings, and to the costs thrown away by reason of the improper contention of certain parties that the trusts relating to the Grange were no longer subsisting.

I think it may be desirable to add that this Court expresses no opinion on the question whether the title to the Grange is such as could be forced upon a purchaser. That matter among others may fall to be considered at a later date.

Order accordingly.

WOO CHEE MENG & ORS. v. THE COLLECTOR OF LAND REVENUE, LOWER PERAK.

[Court of Appeal (Pretheroe, Ag. C.J., Russell and Hill, JJ.) September 13, 1950]

[F.M. — Civil Appeal No. 20 of 1950]

Land Acquisition Enactment, ss. 9(iv), 10(i) and 31(ii) — Failure of owner to make claim under s. 9 of the Land Acquisition Enactment.

This was an appeal from the decision of the learned Judge on a matter referred for determination by the Collector of Land Revenue, Lower Perak. A declaration for the acquisition of the land in question had been published and the Collector had served a notice on the registered proprietors of the land as required under